In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 172

MERRITT-CHAPMAN & SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims, reproduced in the Additional Appendix to the Petition (Pet. App. 1-29) is unreported.

JURISDICTION

The decision of the Court of Claims was entered on February 17, 1967. The petition for a writ of certiorari was filed on May 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims correctly construed petitioner's contract with the government as providing that final and binding acceptance of the contract goods was not to take place until they were installed and inspected at the work-site.

STATEMENT

Petitioner is the successor in interest of the Savin Construction Corporation, which had entered into a contract with the Pittsburgh District of the Army Corps of Engineers to furnish and install four lock gates on the Ohio River.[1] Petitioner subcontracted the fabrication of the gates to a New Orleans firm (Higgins), and the New Orleans District of the Corps of Engineers provided a government inspector, who inspected the work while in progress. After fabrication of the gates was completed, Higgins shipped the gates to the Ohio work-site. At the time of shipment, government inspectors signed forms DD-250-3, entitled "Sub-Order Material Inspection Memorandum" indicating that the gates had been inspected (Pet. App. 8).

After the arrival of the gates at the work-site in Ohio, it was discovered that the gates were seriously defective. In order to bring them up to specifications, further work involving 55,000 man-hours was

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[1] Hereafter, the reference "petitioner" will be to either Savin Construction Corp. or Merritt-Chapman & Scott without distinction.

required (Pet. App. 16).[2] To avoid assessment of liquidated damages for delay petitioner sought an extension of time to perform such work, which was granted by the Corps of Engineers Board of Contract Appeals.

Subsequently petitioner sought an equitable adjustment under the "Changes" article of its contract. Its primary contention was that the inspection of the gates at New Orleans was final and binding on the government under the contract, and that any further work it was required to do constituted a "change" under the contract and that equitable adjustment must be made for such change (Pet. App. 3). This contention was rejected by the contracting officer, and the Board of Contract Appeals affirmed. The Board, relying (by consent of the parties) on the record made in the prior action for an extension of time, found that the defects in the gates were such as to be "departures from the specific requirements of the contract" and were thus, under the express provisions of the contract, not subject to waiver by the New Orleans inspector (at the source). Since the purported acceptance in New Orleans was not binding on the government, the Board denied petitioner any equitable adjustment (Pet. App. 3-4).

Thereafter, petitioner instituted this action in the Court of Claims to review the Board's decision. The court, adopting the opinion of its Commissioner, dismissed the petition. While stating that the record

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[2] The original fabrication of the gates required approximately 66,000 man-hours.

"is replete with evidence of the defective nature of the gates [and] their non-compliance with the specifications * * *," the court found it unnecessary to reach the question whether the defects were "departures from specific requirements of the contract" which were not subject to binding acceptance at the source. The Court of Claims rested its decision on the ground that, under the contract, no final acceptance by the government of the gates was to take place until they were installed and inspected at the work-site. The court, noting that Article 9(d) of the general provisions (upon which petitioner relied) provided that inspection at the place of production would be final *"unless otherwise stated in the specifications,"* held that the specifications showed clearly that final acceptance was to take place after petitioner finished its entire job. Moreover, the Court of Claims found that petitioner's consistent actions demonstrated that it did not consider inspection at New Orleans as constituting final acceptance.[3] It found, moreover, that none of the extra work required by the government went beyond the contract's specifications (Pet. App. 28-29).

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[3] The court pointed out that petitioner had told Higgins on two occasions, prior to the dispute, that the Corps of Engineers would only approve finished, erected gates. Also, during the period of executing the corrective work, petitioner made no contention that the acceptance in New Orleans entitled it to extra compensation. Finally, the court noted that on petitioner's demand, Higgins paid petitioner $250,000 in settlement for its faulty fabrication (Pet. App. 25-26).

ARGUMENT

The Court of Claims, in affirming the decision of the Board of Contract Appeals, held that the contract, read as a whole, clearly provided that final inspection was to take place after completion of the entire job and that the inspection at the source did not preclude the government from thereafter requiring the petitioner to correct defects in the work. Petitioner, without contesting the factual determinations of the Board or the Court of Claims, contends that the court erred as a matter of law in construing this contract as providing for inspection at the work-site after final completion of the contract work. We submit that the Court of Claims' decision is correct and that no issue of any general importance is presented.

The precise question decided by the Court of Claims was whether the specifications of the contract between petitioner and the government provided for final acceptance of petitioner's gates at the time they were fabricated at Higgins' plant or after they were finally installed at the site. Article 9(d) of the contract provided for final inspection at the source "unless otherwise stated in the specifications." That the specifications stated *otherwise* is clear. Under the contract, petitioner agreed to "furnish and install lock gates" (Pet. App. 24). Technical Provision 8-08 states that "After erection *and before final acceptance*, the Contracting Officer will examine the gates with the lock unwatered to determine whether or not the workmanship conforms to

the specification requirements," and further provides that "Any defects disclosed shall be corrected by the Contractor at no cost to the government * * *" (Pet. App. 22; emphasis added). General Condition 19 provided that "[a]s soon as practicable *after the completion of the entire work* * * * a thorough examination thereof will be made by the Contracting Officer at the site of the work. If such work is found to comply fully with the requirements of the contract, it will be accepted * * *" (Pet. App. 18-19; emphasis added). And Technical Provision 14-13 provided (relative to shop inspection) that "The acceptance of any material or finished member by an inspector shall not prevent subsequent rejection if such material or member is later found to be defective" (Pet. App. 23). These provisions fully justify the conclusion that final acceptance was to take place after the job undertaken was finished.

In addition, petitioner's conduct throughout its dealings fully supports the court's determination that it understood that acceptance would be withheld until completion of the job. That course of conduct, which petitioner does not claim was improperly assessed or described by the court, is entitled to great weight. As this Court stated in *Old Colony Trust Co.* v. *Omaha*, 230 U.S. 100, 118:

> Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to the subject of controversy is deemed of great, if not controlling, influence. * * *

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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